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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1212

INDEPENDENT STAVE COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 15, 1965 pursuant to its opinion filed November 10, 1965.

CITATIONS TO OPINIONS BELOW.

The Trial Examiner's Decision is reported at 148 NLRB 433 and is printed in the Record prepared for the Court of Appeals at pp. 217-230. The Decision and Order of the

National Labor Relations Board, printed in the Record prepared for the Court of Appeals,[1] pp. 233-236, is reported in 148 NLRB 431. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 19, is reported in 352 F. 2d 553.

JURISDICTION.

The judgment and decree of the Court of Appeals was entered December 15, 1965 pursuant to its opinion filed November 10, 1965 (R. 44, 19; pp. 51, 19, *infra*). On February 8, 1966, after due consideration, the Court of Appeals denied petitioner's Petition for Rehearing, leave to file said Petition having previously been granted on January 10, 1966 (R. 61, 50). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

An International union is certified by the National Labor Relations Board to represent a unit of employees at petitioner's only plant, located in outstate Missouri. The International creates a Local union to administer the contracts with the Company and allows it to participate in the bargaining for three successive contracts over the years, on some occasions the Local acting without International representatives present. In 1963, while a new contract is being negotiated the Local and the International disagree as to wage proposals and the International, without notifying the Company of its reasons, withdraws from previously scheduled negotiations allowing the Local to continue them. Subject only to ratification by the employees, the Company and the Local negotiate a new contract involving substantial benefits and concessions by the Company. The day of the scheduled vote by the employees on ratification of the contract, the Company re-

[1] Hereafter cited as "A. R."

ceives a telegram indicating for the first time that the International Executive Board reserves the right to approve any contract which the Local and the Company may enter into. The employees ratify the contract by a vote of 74 to 25. The contract is executed by the Company and the Local. The International Executive Board repudiates the agreement and demands further negotiations. The Company refuses. A Trial Examiner of the National Labor Relations Board rules that the Company has failed to bargain in good faith because whatever authority the Local had, real or apparent, was revoked before execution of the agreement relying in large part on the telegram. The National Labor Relations Board adopts these findings and the Court of Appeals enforces its order. Two questions are presented:

1. May the certified International union, consistently with Section 2 (13) of the National Labor Relations Act, as amended, 29 U. S. C., § 152 (13) and the federal requirements for stable collective bargaining relationships, limit the negotiating authority of its Local after the Local has already reached agreement with the Company on a contract to be submitted to the employees for ratification?

2. Should the Court of Appeals enforce without modification an ambiguous Board order (a) which invalidates the contract for all purposes and is not limited so as to proscribe only the Company's use of that contract to forestall collective bargaining and (b) which nevertheless preserves employee rights under that contract without preserving Company defenses thereto?

STATUTES INVOLVED.

Section 2 (13) of the National Labor Relations Act, as amended (61 Stat. 139, 29 U. S. C., § 152 (13)), provides:

> "In determining whether any person is acting as an 'agent' of another person so as to make such other

person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Section 8 (a) (5) of the National Labor Relations Act, as amended (49 Stat. 452, 29 U. S. C., § 158 (a) (5)), provides:

"(a) It shall be an unfair labor practice for an employer—

• • •

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159 (a) of this title."

Section 9 (a) of the National Labor Relations Act, as amended (49 Stat. 453, 29 U. S. C., § 159 (a)), insofar as it may be pertinent here provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

STATEMENT.

On September 18, 1964, petitioner, Independent Stave Company, Inc., initiated proceedings in the Court of Appeals for the Eighth Circuit to review an order of the National Labor Relations Board[2] requiring it to bargain exclusively upon request with the Coopers International Union of North America, AFL-CIO[3] (the representative of

[2] Hereinafter referred to as the "Board".

[3] Hereinafter referred to as the "International".

its employees according to a Board certification of September, 1955), to cease giving effect to its contract of July 18, 1963 with Local 42 of the Coopers International Union of North America, AFL-CIO,[4] and to take certain ancillary, remedial steps (R. 1, A. R. 227-228, 234-235). This order was based upon findings that the petitioner violated Section 8 (a) (5) and (1) of the National Labor Relations Act,[5] as amended, 29 U. S. C., § 158 (a) (5) and (1), when it executed a collective bargaining agreement with Local 42 and thereafter refused to meet with International representatives who had repudiated that contract (AR. 219-226, 233-234).[6] The Board cross-petitioned for enforcement (R. 17). Since petitioner's principal place of business is located at Lebanon, Missouri where the alleged unfair labor practices occurred (A. R. 108, 218-223), the jurisdiction of the Court of Appeals for the Eighth Circuit was properly invoked pursuant to Section 10 (f) and (e) of the Act, 29 U. S. C., §§ 160 (f) and (e).

Prior to 1963, the parties had negotiated three contracts with terms beginning in 1955, 1957 and 1960 (A. R. 245, 252, 237, 224).

According to the Trial Examiner's findings, adopted by the Board, in the 1963 negotiations the parties met and negotiated on June 26 and July 11 with International and Local representatives present, the International representative having been sent "to assist the Local in negotiations," but they in fact took the lead in the discussions (A. R. 219-20). Negotiations were scheduled to continue on July 12, but the Local officers disagreed with the International Vice-President over wage proposals and as a

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[4] Hereinafter referred to as the "Local" or "Local 42".

[5] Hereinafter referred to as the "Act".

[6] The Complaint did not charge, and the Board did not find, any independent violation of Section 8 (a) (1) of the Act, 29 U. S. C., § 158 (a) (1) (interference, restraint or coercion of employee rights). The Section 8 (a) (1) violation was wholly dependent upon the finding of a refusal to bargain.

result the International Vice-President did not attend the July 12 meeting but instead, after consultation with the International President, told the Local that he would not assist them further (A. R. 220).

On July 12 and July 13 the Company and the Local continued negotiations, substantial concessions were made by the Company and agreement was reached that the union negotiators would take the contract back to the employees for ratification (A. R. 89, 102-3, 110-3, 141, 206-7 (negotiations and concessions); 127, 90-91, 102, 142, 207 (tentative agreement subject to ratification by employees)). Neither the Trial Examiner, the Board nor the Court below made any finding as to whether or not tentative agreement was reached on July 13 subject only to employee ratification, despite petitioner's insistence that such a finding was crucial (E. g., Exceptions, par. 3, A. R. 231; Reply Brief, *infra*, pp. 57-59).[7]

There was considerable testimony that the Local was, in fact, authorized to conduct these negotiations, and although its authority to vary from the International's wage proposals apparently was limited, before July 16 these limitations had not been communicated to the Company (A. R. 47, 65-66, 72, 75, 89).

On July 16, 1963, the day on which the employees were to vote on ratification of the contract, the Company and the Local received a telegram from the International's president advising for the first time that under the Inter-

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[7] Both here and in the prefatory portion of the Questions Presented, *supra*, p. 2, petitioner has assumed that the Board would not dispute the fact that the parties to the July 13 negotiations reached tentative agreement on that date, subject only to employee ratification. It cannot be determined from the Board's Decision whether it questioned these facts—or the law—that such an agreement could not lawfully be repudiated by the International. Unless this assumption is made, the Board may have totally frustrated judicial review by relying on an unarticulated, erroneous legal rule condoning such repudiations. The Court of Appeals should have remanded for a proper finding of these facts but it refused to do so.

national constitution ". . . no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board" (A. R. 221, 124). Later that day, the ratification vote was taken, and the employees ratified the agreement by an overwhelming majority (A. R. 90-1, 94, 109). On July 18, 1963, the contract was signed by the Local officers and the Company (A. R. 221).

On August 1, 1963, after a vote of its executive board, the International rejected the contract "by reason of the substandard provisions thereof" and demanded further negotiations, thus attempting to exercise the right of disapproval it first asserted in its telegram of July 16 (A. R. 222, 225, 124-5).

Thereafter, the Company refused to negotiate further with the International (A. R. 222-3).

The complaint issued by the General Counsel did not charge petitioner with bad faith or a violation of Section 8 (a) (5) of the Act in negotiating with the Local on July 12 and 13; it merely charged that when the Company "entered into" the contract with the Local on July 18 and thereafter refused to bargain it violated the Act (Complaint, pars. VIII, XIII; A. R. 6-8).

Furthermore, the Trial Examiner conceded that "the record in the case is somewhat uncertain" with respect to the Local's apparent authority and expressly refused to decide whether the Local had either actual or apparent authority because "whatever authority, real or apparent, Local 42 and its officers had was revoked to [petitioner's] knowledge before **execution** of the 1963 labor contract" (A. R. 224-5) (emphasis added). In so finding the Trial Examiner clearly ruled that the International's July 16 telegram was an effective disavowal of the Local's authority and that the International was thus free to reassert its statutory right to require the Company to bargain (A. R.

225). The Trial Examiner concluded "that by **executing** an agreement with the officers of Local 42 and by refusing to meet with the [International] as found, [petitioner] refused to bargain with the [International] in violation of Section 8 (a) (1) and (5) of the Act as alleged" (A. R. 226) (emphasis added). Before the Board, petitioner specifically excepted to these findings of Trial Examiner, petitioner arguing that any alleged revocation of the Local's authority was untimely because the contract had already been negotiated when the telegram was received. The exception stated:

> "3. The Trial Examiner erred in his Decision by confusing 'negotiated' contract with 'executed' contract (Dec. p. 5, lines 39, 40 and 41, p. 6, lines 7 and 8) [A. R. 225, ll. 7-11, A. R. 225, ll. 29-32]. The evidence is uncontradicted that the alleged 'revocation of authority' was not received until after the contract was negotiated (Tr. 105, 31, 110) [A. R. 90-91, 40, 93-94]. The [International] had no right to refuse to **execute** the contract (Section 85 of the Constitution, Tr. 22-23) [A. R. 34-35]. The Examiner's position ignores the Law of Agency and the provisions of Section 2 (13) of the Act" (A. R. 231).

The Board, nevertheless, adopted the Trial Examiner's findings, conclusions and recommendations as set forth above without even discussing this issue (A. R. 233-4).

The Court of Appeals enforced the Board's order holding that "The evidence does not fairly justify a conclusion . . . that, in the eyes of petitioner, Local 42 had either actual or apparent authority to negotiate any binding agreements" (Opinion, Appendix A, *infra*, p. 31). In support of this conclusion the Court, after discussing certain "facts" neither found[8] nor relied on by the Trial Examiner and the Board, reasoned:

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[8] While the Court held that "Petitioner was well aware of the disagreement **over wage demands** between [the International Vice-President] and Local 42 as being the reason why [the In-

> "Petitioner also ignored [International President] Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless or until the terms of such agreement were first approved by International. In spite of this warning, petitioner, two days later on July 18th, entered into the agreement now in question" (Opinion, Appendix A, *infra*, p. 31).

This reasoning completely ignores the argument repeatedly pressed by petitioner in its Brief and its Reply Brief that the telegram was too late to constitute an effective disavowal of the Local's authority since the Local and the Company had already reached agreement subject only to ratification by the employees (See Appendix C, *infra*, pp. 53-60).

In its Petition for Rehearing, petitioner pointed out this error to the Court below (R. 57-60, Petition for Rehearing, pp. 6-9).

By a similar error in reasoning, the Court below found that Section 85 of the International Constitution gave each local the right to negotiate its own contracts **subject to approval of the general executive board** and that therefore "the approval of the general executive board of International is an essential prerequisite to a final contract." (Opinion, Appendix A, *infra*, p. 34). The Court, however, found that the Company was barred by this limitation without finding that it had ever been communicated to the Company prior to the consummation of the negotiations in a tentative agreement, and the record shows that

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ternational Vice-President] did not attend the July 12 meeting, . . ." (Opinion, Appendix A, *infra*, p. 31, emphasis added), there is no support in the record for this assertion. The Company was never told that there was a disagreement "over wage demands" and the Trial Examiner did not find that it was (A. R. 89, 97, 221, 225). The entire exchange on this subject was quite brief. The nature, extent and importance of the disagreement was not explained to the Company during the negotiations, and could not have been without destroying the union's bargaining position.

the Company first learned of this restriction on July 16 (A. R. 225, 47, 90). The Court thus ignored the Company's argument that negotiations by the Local pursuant to this provision in the International Constitution authorizing the Local to negotiate a contract subject to the approval of the International's general executive board creates apparent authority to negotiate a binding agreement unless the limitation requiring International approval is communicated to the Company at least prior to the conclusion of negotiations resulting in an agreement to be presented to the employees for ratification (See Appendix C, *infra,* p. 60).

The sole change made by the Board, on reviewing the Trial Examiner's Decision, was to add the following provision to the recommended order and to modify the notice to be posted by the Employer to conform to this change:

> "1. Cease and desist from:
>
> (b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder" (A. R. 233-6).

The Court of Appeals was troubled by this provision. It apparently interpreted it to mean that the International could not seek to bargain over retroactive wage increases or benefits (Opinion, Appendix A, *infra,* pp. 36-37). On December 15, 1965, after considering Petitioner's objections to the Board's proposed decree, the Court enforced the Board's order, "as interpreted in its opinion dated November 10, 1965" (Decree, Appendix B, *infra,* pp. 51-52). On February 8, 1966, the Court of Appeals denied peti-

tioner's Petition for Rehearing which pointed out that the order as enforced was inconsistent with this Court's decision in **J. I. Case v. NLRB**, 321 U. S. 332 (1944), and with the decision of the Ninth Circuit filed December 2, 1965 in **NLRB v. Golden State Bottling Company**, now reported in 353 F. 2d 667 (R. 61, 51-60).

REASONS FOR GRANTING THE WRIT.

I.

The facts presented in the record in this case are almost unique but the issue involved—whether a union may limit the authority of its negotiators after they have already reached agreement with the Company on a contract to be submitted to the employees for ratification—lies at the heart of all collective bargaining. It arises, potentially, every time collective bargaining negotiations are concluded. Its proper resolution by this Court is essential if the National Labor Relations Act is to achieve the goals for which it was enacted: the establishment and fostering of stable collective bargaining relationships. Without its resolution, no employer can safely make concessions in negotiations without the risk that, as in this case, some higher union authority than its immediate negotiators will demand further concessions as the price of a contract. Yet the Trial Examiner, the Board and the Court below, without so much as discussing this fundamental issue and despite petitioner's repeated insistence that the issue must be resolved, all held that a certified international could repudiate the work of its authorized negotiators after they had reached agreement with the Company, provided only that the International asserted the right to reject that agreement prior to final execution. Such a holding is in conflict with the clear Congressional mandate of Section 2 (13) of the Act, 29 U. S. C. § 152 (13) that ordinary, common-law principles of agency are to govern union responsibility in matters relating to collective bargaining.

This fundamental question of federal labor law has not previously been resolved by this Court and it should be resolved now.

1. The issue in this case happens to arise in the context of a conflict between a certified international union and its local. But the Board refused to decide the question of whether the local was actually or apparently authorized to negotiate for the International, and the Court below, in deciding that the local was not so authorized, relied on the July 16th telegram which attempted to subject the results of a completed negotiation to International executive board approval. The issue here would therefore be identical even if the Company had bargained directly with the International Vice-President or any other apparently authorized representative of the International. This question obviously is of broad significance to the development of federal labor law since a rule allowing such last-minute restrictions on a negotiator's authority would create suspicion and distrust rather than stable collective bargaining relationships and would totally change the entire psychology at the bargaining table. **Cf., M & M Oldsmobile, Inc., (Local 259, U. A. W.)**, 156 NLRB No. 91, 61 LRRM 1121, 1123, 1966 CCH NLRB ¶ 20,150 (1966).

2. Section 2 (13) of the National Labor Relations Act, 29 U. S. C., § 152 (13), added by the Taft-Hartley amendment in 1947, represents "a clear statutory mandate to apply the 'ordinary law of agency'" in determining union responsibility. **International Longshoremen's Union (Sunshine Line and Twine Company)**, 79 NLRB 1487, 1507 (1948). "[B]oth employers and labor organizations will be responsible for the acts of their agents in accordance with ordinary common law rules of agency (and only ordinary evidence will be required to establish the agents' authority)." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947), 1 Leg. Hist. of the L. M. R. A., 1947, 540 (U. S. Government Printing Office 1948). While numerous courts of appeals have indicated their acceptance of this

change, e. g., **I. L. G. W. U. v. NLRB**, 237 F. 2d 545, 551 (D. C. Cir. 1956); **NLRB v. International Longshoremen's Union**, 283 F. 2d 558, 563 (9th Cir. 1960); **United Mine Workers v. Patton**, 211 F. 2d 742, 747-8 (4th Cir.), **cert. denied**, 348 U. S. 1824 (1954), the Eighth Circuit apparently does not. **NLRB v. Arkansas-Louisiana Gas Company**, 333 F. 2d 790, 795-6 (1964) (Employer responsibility). Perhaps this conflict in approach between the circuits helps to explain the Eighth Circuit's result here, although its opinion does not refer to this problem,[9] because under ordinary principles of agency no such thirteenth-hour limitation as was approved in this case would be effective.

3. The results here reached by the Eighth Circuit also clearly conflict in principle with the results reached by other courts of appeals dealing with similar problems. Thus, the Seventh Circuit in **NLRB v. Acme Mattress Co., Inc.**, 192 F. 2d 524, 527 (1951), held the International responsible for the actions of a person held out by it as its negotiator where "[n]o limitation was communicated to the Company with respect to Cline's [the negotiator's] apparent authority to impart to the Company the terms and conditions upon which the International would execute the contract. . . ." And in **NLRB v. Winchester Electronics, Incorporated**, 295 F. 2d 288, 290-1 (1961), the Second Circuit refused to allow an employer's president to repudiate an agreement after negotiations had closed but prior to the contract's execution because the employer's negotiator had actual or apparent authority to bargain and had not told the union negotiator during the bargaining that further approval from the employer was necessary.

4. Perhaps the most distressing feature of the Court's result here is that although the petitioner raised the ques-

[9] It should be noted, however, that the Court did cite **NLRB v. Arkansas-Louisiana Gas Co.**, in its opinion, *infra*, p. 29, and that both opinions were by Circuit Judge Vogel.

tion of whether the July 16th telegram was untimely both before the Board and in the Court below, neither the Board nor that Court ever discussed this issue. Such action by the Court of Appeals in approving the Board's decision under these circumstances is directly contrary to this Court's recent directive that the Board may not be allowed to frustrate judicial review by hiding behind unarticulated bases of decision. **NLRB v. Metropolitan Life Ins. Co.**, 380 U. S. 438, 442-44 (1965). As in **American Ship Building Co. v. NLRB**, 380 U. S. 300 (1965), "The compelling conclusion is that the Board has failed to 'disclose the basis of its order' and to 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *Id.*, 380 U. S. at 321 (concurring opinion of Mr. Justice White).

II.

Paragraph 1 (b) of the Board's order which the Court below interpreted and then enforced does not contain any of the safeguards and limitations carefully delineated by this Court in the controlling decision of **J. I. Case Co. v. NLRB**, 321 U. S. 332 (1944) (Order Appendix B, *infra*, pp. 40-45; Opinion, Appendix A, *infra*, pp. 36-37). This paragraph of the order is not limited to redressing the unfair labor practice found to have been committed—the refusal to bargain—but rather invalidates the contract for all purposes. Moreover, it purports to preserve employee rights under that contract but does not preserve employer defenses as required by **J. I. Case Co. v. NLRB**, *supra*, 321 U. S. at 341-2. As such the decree of the Court below not only is not in accord with the applicable decision of this Court, but also conflicts with the recent holding of the Ninth Circuit in **NLRB v. Golden State Bottling Company**, 353 F. 2d 667 (December 2, 1965) (Appendix D, *infra*, pp. 61-67 at p. 67). This remedy is frequently used by the Board not only in refusal to bargain cases, but also in cases involving interference and domination of a labor or-

ganization in violation of Section 8 (a) (2) of the Act, 29 U.S.C., § 158 (a) (2). Moreover, even as construed by the Court of Appeals, the order is vague and ambiguous, and petitioner should not be required to guess at its meaning on pain of contempt if it guesses wrong.

1. The order in **J. I. Case Co. v. NLRB**, 321 U. S. 332 (1944) was specifically modified so as to require only that the individual contracts of employment there involved not be given effect so as "*to forestall collective bargaining or deter self-organization,*" *Id.* at 341. The italicized language was added by this Court. Here the order is not limited to requiring the Company to cease giving effect to the July 18, 1963 contract for the purpose of forestalling collective bargaining. Paragraph 1 (b), literally construed, precludes the Company from giving effect to that contract for any purpose—as a defense to a prosecution under § 302 (c) (4) of the Act, 29 U. S. C., § 186 (c) (4), in a suit under § 301 of the Act, 29 U. S. C., § 185, or in any other circumstances. Not only does the order, therefore, not conform to the limitations of the Board's jurisdiction established in **J. I. Case Co. v. NLRB**, *supra*, but it also conflicts with the principle of concurrent jurisdiction in the Board and in the courts acting under § 301 as recognized in **Smith v. Evening News Association**, 371 U. S. 195, 197-8 (1962), **cf., Cresent Bed Co., Inc.** (United Steelworkers), 157 NLRB No. 22, 61 LRRM 1334, 1336, 1966 CCH NLRB ¶ 20,225 (1966). In failing to so limit its order to redressing the failure to bargain found to have been committed, the Board completely overstepped its jurisdiction and its order, at the very least, should have been modified. **J. I. Case Co. v. NLRB**, *supra*, 321 U. S. at 340.

2. Moreover, it may be doubted that paragraph 1 (b) of the Board's order serves any useful purpose. The Board in paragraph 1 (a) ordered the Company to cease and desist from refusing to bargain exclusively with the International and in paragraph 2 (a) affirmatively ordered

such bargaining upon request by the International (A. R. 227-8, 234; Appendix B, *infra*, pp. 40-41, 38). It is basic hornbook law that the duty to bargain collectively requires the Company to refrain from unilaterally changing any existing working conditions without first bargaining in good faith to an impasse. E. g., **NLRB v. Katz**, 369 U. S. 736 (1962). Thus, paragraphs 1 (a) and 2 (a) effectively prohibit the Company from making unilateral changes in the conditions established under the contract found to be invalid without first bargaining with the International. Paragraph 1 (b) is not necessary to achieve that result.

3. This Court in **J. I. Case v. NLRB**, *supra*, 321 U. S. at 341-2, specifically modified the order there involved so as to preserve any employer defenses to employee rights asserted under the invalid contracts. The order here is not so limited. On the one hand it invalidates the 1963 contract while at the same time preserving only employee rights thereunder. As such, the order here not only does not conform to the requirement of **J. I. Case v. NLRB**, *supra*, but becomes totally one-sided and unenforceable. This was the view of the Ninth Circuit, in direct conflict with the Court below, when it held, in **NLRB v. Golden State Bottling Company**, 353 F. 2d 667, 670-1 (December 2, 1965), that:

> "We fail to see how the company can cease and desist from performing or enforcing the contract while at the same time allowing the assertion of employee rights thereunder. We refuse to direct such one-sided enforcement."

The Board in **Golden State** petitioned for rehearing, citing among other cases, the decision in this case by the Court below (Appendix D, *infra*, pp. 67-68). That petition for rehearing was denied by the Ninth Circuit on January 7, 1966. The case is still pending there on a petition for reconsideration of the petition for rehearing. The petition

for reconsideration, however, is based on a point relating to the merits, not the remedy, in that case. Petitioner in this case also filed a petition for rehearing of the remedy point in the Court of Appeals (R. 51). That petition was based largely on the conflicting decision in **NLRB v. Golden State Bottling**, *supra*, and upon the Court's failure to follow the principles established in **J. I. Case v. NLRB**, *supra*. On February 8, 1966, after consideration, that petition was denied without comment (R. 61). Thus, the conflict between the Eighth and Ninth Circuit decisions will stand uncorrected and unresolved unless this Court acts.

4. The remedy provided in paragraph 1 (b) is used with some frequency by the Board—generally without the safeguards and limitations prescribed in **J. I. Case v. NLRB**, *supra* (See e. g., cases cited by the Board in its Ninth Circuit Petition for Rehearing, Appendix B, *infra*, p. 68). It is not only used in refusal to bargain cases, such as this one, but also in interference and domination cases under § 8 (a) (2), 29 U. S. C., § 158 (a) (2), of the Act where the courts also are frequently troubled by it. See, **NLRB v. Mark J. Gerry, Inc.**, 355 F. 2d 727, 729-31, 61 LRRM 2200, 2201-2 (9th Cir. 1966) (refusing enforcement).

5. Finally, even as construed in the Court below paragraph 1 (b) is extremely difficult to understand and obey. The Court of Appeals held that 1 (b) was "prospective only, with no retrospective aspects" (Opinion, Appendix A, *infra*, p. 37). But if the International seeks to negotiate, what is the dividing line between the two? Is it August 25, 1964 when the Board issued its order? Is it November 10, 1965, when the Court filed its opinion? Is it December 15, 1965, when the Court entered its decree? Or is it perhaps some later date? And is the Company really barred, as the order literally provides, from raising any defenses to employees' assertions of rights under a contract found

by the Board not to be binding on the union? Clearly, as this Court stated in **J. I. Case v. NLRB**, *supra*, 321 U. S. at 341, these "[q]uestions of construction had better be worked out before enforcement orders issued than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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